

WANG (Migration) [2020] AATA 2564 (11 May 2020)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Bing WANG
CASE NUMBER:	1817620
DIBP REFERENCE(S):	BCC2018/763209
MEMBER:	Antoinette Younes
DATE:	11 May 2020
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decision to cancel the applicant's Subclass 500 (Student) visa.

Statement made on 11 May 2020 at 10:55am

CATCHWORDS

MIGRATION – cancellation – Student (Temporary) (Class TU) visa – Subclass 500 (Student) – incorrect information in application – bogus document – applicant did not attend hearing – decision under review affirmed

LEGISLATION

Migration Act 1958 (Cth), ss 5, 48, 99, 101, 103, 107, 109
Migration Regulations 1994 (Cth), r 2.41

CASES

MIAC v Khadgi (2010) 190 FCR 248

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration to cancel the applicant's Subclass 500 (Student) visa under s.109(1) of the *Migration Act 1958* (the Act).
2. The delegate cancelled the visa on the basis that the applicant did not comply with s.101 and s.103 of the Act. The issue in the present case is whether that ground for cancellation is made out, and if so, whether the visa should be cancelled.
3. For the following reasons, the Tribunal has concluded that the decision to cancel the applicant's visa should be affirmed.

HEARING INVITATION

4. On 27 March 2020, the Tribunal wrote to the applicant advising that it had considered all the material before it relating to the application but it was unable to make a favourable decision on that information alone. The Tribunal invited the applicant to give oral evidence and present arguments at a telephone hearing scheduled at 1.00pm on 6 May 2020. The applicant was advised that if he did not attend the hearing and a postponement was not granted, the Tribunal may make a decision on the case without taking any further action to allow or enable the applicant to appear before the Tribunal or may dismiss the application for review without any further consideration.
5. The Tribunal exercised its discretion to hold the hearing by telephone. The hearing was held during the COVID-19 pandemic. The Tribunal determined it was reasonable to hold a hearing by telephone, having regard to the nature of this matter and the individual circumstances of the applicant. The Tribunal also had regard to the Tribunal's objective of providing a mechanism of review that is fair, just, economical and quick, and the delay to the matter if the hearing was not to be conducted by telephone.
6. On 29 April and 5 May 2020, the Tribunal sent to the applicant by SMS hearing reminders to the telephone number provided by the applicant in the application for review. The Tribunal received messages that the delivery of the SMS had failed.
7. The applicant provided submissions but did not appear on the scheduled hearing date and time.
8. The Tribunal is satisfied that it has given the applicant a fair opportunity to attend a hearing. The Tribunal has no explanation for the lack of response to the hearing invitation or attendance. In those circumstances, the Tribunal has decided to make its decision on the review without taking any further action.

CONSIDERATION OF CLAIMS AND EVIDENCE

9. Section 109(1) of the Act allows the Minister to cancel a visa if the visa holder has failed to comply with ss.101, 102, 103, 104, 105 or 107(2) of the Act. Broadly speaking, these sections require non-citizens to provide correct information in their visa applications and passenger cards, not to provide bogus documents and to notify the Department of any incorrect information of which they become aware and of any relevant changes in circumstances.

10. The exercise of the cancellation power under s.109 of the Act is conditional on the Minister issuing a valid notice to the visa holder under s.107 of the Act, providing particulars of the alleged non-compliance. Where a notice is issued that does not comply with the requirements in s.107, the power to cancel the visa does not arise. Extracts of the Act relevant to this case are attached to this decision.
11. In the present matter, the Tribunal is satisfied that the delegate had reached the necessary state of mind to engage s.107 and that the notice issued under s.107 complied with the statutory requirements.

Was there non-compliance as described in the s.107 notice?

12. The issue before the Tribunal is whether there was non-compliance in the way described in the s.107 notice, being the manner particularised in the notice, and if so, whether the visa should be cancelled. The non-compliance identified and particularised in the s.107 notice was non-compliance with ss. 101 and 103 of the Act.
13. Section 101 provides that:
 14. *Visa applications to be correct*
 15. *A non-citizen must fill in or complete his or her application form in such a way that:*
 16. (a) *all questions on it are answered; and*
 17. (b) *no incorrect answers are given or provided.*
18. Section 103 provides that:
 19. *Bogus documents not to be given etc.*
 20. *A non-citizen must not give, present, [produce]* or provide to an officer, an authorised system, the Minister, the Immigration Assessment Authority, or the Tribunal performing a function or purpose under this Act, a bogus document or cause such a document to be so given, presented, [produced]¹ or provided.*
21. The applicant provided to the Tribunal a copy of the delegate's decision record. Relevantly, the delegate's decision refers to the following matters:
 - On 15 August 2017, the applicant lodged electronically an application for a Student (subclass 500) visa (student visa application).
 - On pages 7 to 8 in response to the question in the application form "*Give details of the applicant's highest level of schooling completed outside Australia*", the applicant provided the following details:
 22. *Highest level of schooling completed:* *Bachelor degree (including honours) or equivalent*
 23. *Course name:* *Bachelor of Science in Business Information Systems*
 24. *Institution name:* *Middlesex University London*

^{*}This wording applies to documents given, presented, produced or provided on or after 4 November 2014: Schedule 7 to Counter Terrorism Legislation Amendment (Foreign Fighters) Act 2014 (No.116, 2014).

¹

25. Country of institution:

UNITED KINGDOM

- On page 14, in response to the declaration "*The applicants declare that they: have provided complete and correct information in every detail on this form, and on any attachments to it,*" the applicant responded "yes".
 - On page 14, in response to the declaration "*The applicants declare that they: understand that if documents are found to be fraudulent or information to be incorrect after the grant of the visa, the visa may subsequently be cancelled,*" the applicant responded "yes".
 - In support of the student visa application, the applicant provided a certificate issued from Middlesex University London stating that he had been awarded the degree of Bachelor of Science in Business information Systems, dated 23 May 2017. The certificate was signed by Vice Chancellor Michael Driscoll.
 - Based on the information provided, the applicant was granted the student visa on 22 August 2017.
 - The Department undertook integrity checks regarding the applicant's Bachelor of Science in Business Information Systems degree awarded from Middlesex University London, dated 23 May 2017. It was confirmed that Vice Chancellor Michael Driscoll had left this role in 2015 and would not have signed the Bachelor of Science in Business Information Systems document dated 23 May 2017. The certificate also contains the same certificate issue number as multiple other fraudulent certificates.
26. On 9 May 2018, the Department sent to the applicant a notice of intention to consider cancellation (NOITCC). The Departmental letter was returned to the sender as being unclaimed.
27. In submissions to the Tribunal, the applicant noted that:
- He was worried about whether he could clearly explain his position. He was excited about coming to Australia. He arrived in Australia on 3 September 2017, having provided information to an agent in China. In Australia, he attended school, and all went smoothly.
 - In June 2018, he received a card notification at his home from the post office to pick up a letter but he missed the post office and did not realize that the letter was from the Department. He later realised that the letter related to the cancellation of the visa. He checked his visa status through VEVO but did not find any information about his visa at the time. He asked the school teacher and discovered that his visa had been cancelled. He was overwhelmed, frustrated and he did not know the reasons for the cancellation.
 - He contacted the Department subsequently and he was informed that his visa had been cancelled. He had not received an email about the cancellation notification or the intention to cancel. In June 2018, he found the letter relating to the cancellation. He is puzzled about the grounds for cancellation. He did not provide the certificate to his "*Chinese intermediary*" and he did not provide that person with information relating to this certificate. He found a local agent who advised him to seek review by the AAT.
 - He did not provide the bogus certificate nor did he know that the "*Chinese agent*" had lodged that certificate. He now understands that despite not knowing of the provision

of the bogus document, he is still responsible for the provision of that information which “*seems to be a joke to me*”.

28. FINDINGS AND REASONS

29. In the letter of hearing invitation, the Tribunal advised the applicant that it was unable to make a favourable decision on the basis of the available information. The Tribunal invited the applicant to attend the scheduled hearing which is the applicant’s opportunity to provide further information and to make any submissions relevant to the cancellation. The applicant did not attend the hearing.
30. Had the applicant attended the hearing, he would have had the opportunity to provide further details about the alleged conduct of the claimed agent. The Tribunal would have asked the applicant questions about the completion of the visa application form, any assistance and relevant questions about his current circumstances.
31. The Tribunal has considered the applicant’s submissions. The applicant has contended he did not know that incorrect information and a bogus document had been provided.
32. The Tribunal has serious doubts about the applicant’s claims that he was not responsible for or had knowledge of the provision of the incorrect information. In any event s.99 of the Act is enlivened, irrespective of whether the applicant knew.
33. Section 99 provides that:
 34. *Information is answer*
 35. *Any information that a non-citizen gives or provides, causes to be given or provided, or that is given or provided on his or her behalf, to the Minister, an officer, an authorised system, a person or the Tribunal, or the Immigration Assessment authority, reviewing a decision under this Act in relation to the non-citizen’s application for a visa is taken for the purposes of section 100, paragraphs 101(b) and 102(b) and sections 104 and 105 to be an answer to a question in the non-citizen’s application form, whether the information is given or provided orally or in writing and whether at an interview or otherwise.*
36. The Bachelor of Science in Business Information degree from Middlesex University London is not a genuine document. The Tribunal finds that it is a bogus document as defined in s.5(1) of the Act, namely:
 37. *In this Act, unless the contrary intention appears:*
 38. **“bogus document,”** in relation to a person, means a document that the Minister reasonably suspects is a document that:
 39. (a) *purports to have been, but was not, issued in respect of the person; or*
 40. (b) *is counterfeit or has been altered by a person who does not have authority to do so; or*
 41. (c) *was obtained because of a false or misleading statement, whether or not made knowingly.*

42. The Tribunal is satisfied that the Bachelor of Science in Business Information degree from Middlesex University London is a bogus document in that it is counterfeit or has been altered by a person who has no authority to do so, and it was not issued in respect of the applicant.
43. On the basis of the available information, the Tribunal is satisfied that the applicant provided incorrect responses in the application for the student visa lodged on 15 August 2017, as contemplated by ss. 99, 101, and 103. The Tribunal finds that the applicant provided incorrect answers on pages 7-8 and 14 of the student visa application when he claimed and confirmed to have completed the Bachelor of Science in Business Information degree from Middlesex University London, which is incorrect.
44. For these reasons, the Tribunal finds that there was non-compliance with ss.101 and 103 of the Act by the applicant in the way described in the s.107 notice. Therefore, the Tribunal finds that there is ground for cancellation.

Should the visa be cancelled?

45. As the Tribunal has decided that there was non-compliance in the way described in the notice given to the applicant under s.107 of the Act, it is necessary to consider whether the visa should be cancelled pursuant to s.109(1). Cancellation in this context is discretionary, as there are no mandatory cancellation circumstances prescribed under s.109(2).
46. In exercising this power, the Tribunal must consider the applicant's response (if any) to the s.107 notice about the non-compliance, and have regard to any prescribed circumstances: s.109(1)(b) and (c). The prescribed circumstances are set out in r.2.41 of the Regulations. Briefly, they are:

- ***the correct information***

47. On the evidence, the Tribunal finds that the applicant provided incorrect answers on pages 7-8 and 14 when he claimed and confirmed to have completed the Bachelor of Science in Business Information degree from Middlesex University London, which is incorrect.
48. The Tribunal considers the provision of incorrect information to be serious. The Tribunal gives this aspect significant weight in favour of cancellation.

- ***the content of the genuine document (if any)***

49. The Bachelor of Science in Business Information degree from Middlesex University London is a bogus document as defined in s.5(1) of the Act and the Tribunal has given this aspect significant weight in favour of cancellation.
50. There is no 'genuine' document relevant to the Tribunal's consideration. The Tribunal gives this aspect neutral weight.

- ***whether the decision to grant a visa or immigration clear the visa holder was based, wholly or partly, on incorrect information or a bogus document***

51. The Tribunal is satisfied that the decision to grant the student visa was based, wholly or partly on the information that the applicant had completed the Bachelor of Science in Business Information degree from Middlesex University London and the bogus certificate provided.
52. The Tribunal gives this aspect significant weight in favour of cancellation.

- ***the circumstances in which the non-compliance occurred***

53. The non-compliance occurred when incorrect information and a bogus document were provided in the student visa application lodged on 15 August 2017.
54. The Tribunal is mindful that the applicant has claimed that he was not aware that incorrect information and a bogus document had been provided. Even if the Tribunal were to accept the applicant's contentions, under s.99, he is responsible for the provision of the information.
55. The Tribunal gives this aspect significant weight in favour of cancellation.

- ***the present circumstances of the visa holder***

56. The applicant did not attend the hearing or provide details about his current circumstances.
57. The Tribunal gives this aspect neutral weight.

- ***the subsequent behaviour of the visa holder concerning his or her obligations under Subdivision C of Division 3 of Part 2 of the Act***

58. The applicant did not respond to the NOITCC.
59. In submissions to the Tribunal, the applicant indicated that he did not receive the NOITCC or know that his visa had been cancelled until later. The Tribunal observes that the delegate's decision record indicates that the NOITCC was sent to the applicant's last known address, but the letter was returned to sender. The delegate noted that an email was also sent to the applicant's student email address registered by his education provider.
60. The Tribunal does not know the reasons surrounding the NOITCC issue or for its return to sender. In those circumstances, the Tribunal gives this aspect neutral weight.

- ***any other instances of non-compliance by the visa holder known to the Minister***

61. There is no evidence of other instances of non-compliance.
62. The Tribunal gives this aspect neutral weight.

- ***the time that has elapsed since the non-compliance***

63. The non-compliance occurred on 15 August 2017 on lodgement of the student visa application. The Tribunal does not consider this timeframe to be significant warranting favourable consideration.
64. The Tribunal gives this aspect neutral weight.

- ***any breaches of the law since the non-compliance and the seriousness of those breaches***

65. There is no evidence of any breaches of the law.
66. The Tribunal gives this aspect neutral weight.

- ***any contribution made by the holder to the community.***

67. The applicant has not made submissions relating to this aspect.
68. The Tribunal gives this aspect neutral weight.
69. While the above factors must be considered, they do not represent an exhaustive statement of the circumstances that might properly be considered to be relevant in any given case: *MIAC v Khadgi* (2010) 190 FCR 248. The Tribunal may also have regard to lawful government policy. The relevant policy is set out in the Department's Procedural Advice Manual) PAM3 'General visa cancellation powers', which refers to matters such as the consequences of cancelling the visa, international obligations and any other relevant matters.
- ***whether there are mandatory legal consequences, such as whether cancellation would result in the visa holder being unlawful and liable to detention, or whether indefinite detention is a possible consequence of cancellation, or whether there are provisions in the Act which prevent the person from making a valid visa application without the Minister's intervention***
70. The cancellation of the applicant's visa could result in the applicant's detention and potential removal from Australia. He could however make travel arrangements and voluntarily depart Australia.
71. The applicant would also be impacted by s.48 of the Act which means that he may face difficulties in applying in Australia for any further visas. The Tribunal considers potential detention and removal from Australia as well as the s.48 bar to be intended legislative consequences.
72. The Tribunal gives this aspect limited weight in the applicant's favour.
- ***whether there would be consequential cancellations under s.140***
73. There is no evidence of any consequential cancellation.
74. The Tribunal gives this aspect neutral weight.
- ***whether any international obligations would be breached as a result of the cancellation, such as non-refoulement obligations, family unity principles or the obligation to consider the best interests of the child.***
75. There is no information before the Tribunal to suggest that any children would be impacted or that Australia would be in breach of any of its non-refoulement obligations in case of cancellation.
76. The Tribunal gives this aspect neutral weight.
- ***any other relevant matters, including the degree of hardship that may be caused to the visa holder and any family members.***
77. The Tribunal is mindful that the cancellation of the visa would cause a degree of financial, psychological, and emotional hardship to the applicant.
78. The Tribunal gives this consideration some weight in the applicant's favour.
79. The Tribunal is not aware of any other relevant matters.
80. **CONCLUDING REMARKS**

81. The Tribunal has carefully considered the material before it individually and cumulatively. The Tribunal is satisfied that the totality of the considerations weighs heavily in favour of cancellation.
82. The Tribunal has decided that there was non-compliance by the applicant in the way described in the notice given under s.107 of the Act.
83. Having regard to all the relevant circumstances, as discussed above, the Tribunal concludes that the visa should be cancelled.

DECISION

84. The Tribunal affirms the decision to cancel the applicant's Subclass 500 (Student) visa.

Antoinette Younes
Senior Member

ATTACHMENT – *Migration Act 1958* (extracts)

5 Interpretation

- (1) In this Act, unless the contrary intention appears:
- bogus document**, in relation to a person, means a document that the Minister reasonably suspects is a document that:
- (a) purports to have been, but was not, issued in respect of the person; or
 - (b) is counterfeit or has been altered by a person who does not have authority to do so; or
 - (c) was obtained because of a false or misleading statement, whether or not made knowingly.

97 Interpretation

In this Subdivision:

application form, in relation to a non-citizen, means a form on which a non-citizen applies for a visa, being a form that regulations made for the purposes of section 46 allow to be used for making the application.

passenger card has the meaning given by subsection 506(2) and, for the purposes of section 115, includes any document provided for by regulations under paragraph 504(1)(c).

Note: **Bogus document** is defined in subsection 5(1).

98 Completion of visa application

A non-citizen who does not fill in his or her application form or passenger card is taken to do so if he or she causes it to be filled in or if it is otherwise filled in on his or her behalf.

99 Information is answer

Any information that a non-citizen gives or provides, causes to be given or provided, or that is given or provided on his or her behalf, to the Minister, an officer, an authorised system, a person or the Tribunal, or the Immigration Assessment authority, reviewing a decision under this Act in relation to the non-citizen's application for a visa is taken for the purposes of section 100, paragraphs 101(b) and 102(b) and sections 104 and 105 to be an answer to a question in the non-citizen's application form, whether the information is given or provided orally or in writing and whether at an interview or otherwise.

100 Incorrect answers

For the purposes of this Subdivision, an answer to a question is incorrect even though the person who gave or provided the answer, or caused the answer to be given or provided, did not know that it was incorrect.

101 Visa applications to be correct

A non-citizen must fill in or complete his or her application form in such a way that:

- (a) all questions on it are answered; and
- (b) no incorrect answers are given or provided.

103 Bogus documents not to be given etc.

A non-citizen must not give, present, [produce]* or provide to an officer, an authorised system, the Minister, the Immigration Assessment Authority, or the Tribunal performing a function or purpose under this Act, a bogus document or cause such a document to be so given, presented, [produced]² or provided.

107 Notice of incorrect applications

- (1) If the Minister considers that the holder of a visa who has been immigration cleared (whether or not because of that visa) did not comply with section 101, 102, 103, 104 or 105 or with subsection (2) in a response to a notice under this section, the Minister may give the holder a notice:
- (a) giving particulars of the possible non-compliance; and
 - (b) stating that, within a period stated in the notice as mentioned in subsection (1A), the holder may give the Minister a written response to the notice that:
 - (i) if the holder disputes that there was non-compliance:
 - (A) shows that there was compliance; and

*This wording applies to documents given, presented, produced or provided on or after 4 November 2014: Schedule 7 to *Counter Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (No.116, 2014).

- (B) in case the Minister decides under section 108 that, in spite of the statement under sub-subparagraph (A), there was non-compliance—shows cause why the visa should not be cancelled; or
 - (ii) if the holder accepts that there was non-compliance:
 - (A) give reasons for the non-compliance; and
 - (B) shows cause why the visa should not be cancelled; and
- (c) stating that the Minister will consider cancelling the visa:
 - (i) if the holder gives the Minister oral or written notice, within the period stated as mentioned in subsection (1A), that he or she will not give a written response—when that notice is given; or
 - (ii) if the holder gives the Minister a written response within that period—when the response is given; or
 - (iii) otherwise—at the end of that period; and
- (d) setting out the effect of sections 108, 109, 111 and 112; and
- (e) informing the holder that the holder's obligations under section 104 or 105 are not affected by the notice under this section; and
- (f) requiring the holder:
 - (i) to tell the Minister the address at which the holder is living; and
 - (ii) if the holder changes that address before the Minister notifies the holder of the Minister's decision on whether there was non-compliance by the holder—to tell the Minister the changed address.
- (1A) The period to be stated in the notice under subsection (1) must be:
 - (a) in respect of the holder of a temporary visa—the period prescribed by the regulations or, if no period is prescribed, a reasonable period; or
 - (b) otherwise—14 days.
- (1B) Regulations prescribing a period for the purposes of paragraph (1A)(a) may prescribe different periods and state when a particular period is to apply, which, without limiting the generality of the power, may be to:
 - (a) visas of a stated class; or
 - (b) visa holders in stated circumstances; or
 - (c) visa holders in a stated class of people (who may be visa holders in a particular place); or
 - (d) visa holders in a stated class of people (who may be visa holders in a particular place) in stated circumstances.
- (2) If the visa holder responds to the notice, he or she must do so without making any incorrect statement.

108 Decision about non-compliance

The Minister is to:

- (a) consider any response given by a visa holder in the way required by paragraph 107(1)(b); and
- (b) decide whether there was non-compliance by the visa holder in the way described in the notice.

109 Cancellation of visa if information incorrect

- (1) The Minister, after:
 - (a) deciding under section 108 that there was non-compliance by the holder of a visa; and
 - (b) considering any response to the notice about the non-compliance given in a way required by paragraph 107(1)(b); and
 - (c) having regard to any prescribed circumstances;
 may cancel the visa.
- (2) If the Minister may cancel a visa under subsection (1), the Minister must do so if there exist circumstances declared by the regulations to be circumstances in which a visa must be cancelled.